U.S. COURT OF FEDERAL CLAIMS 24th ANNUAL JUDICIAL CONFERENCE
Claremont Hotel Club & Spa, Berkeley, CA
Wednesday, October 19, 2011

WATER RIGHTS AND FIFTH AMENDMENT TAKINGS
General Session, Claremont Empire Ballroom
1:40 PM.-3:10 PM

Property Rights in Water—The Law in California

Joseph L. Sax
University of California (Berkeley)

INTRODUCTION

Hardly anyone outside the arid west knows (or cares) much about water law, but it embraces one of the most extraordinary conceptions of property in the whole of our jurisprudence. Until quite recently, for reasons I will explain shortly, the fundamental precepts of water law have been largely untested. But that is no longer the case, and water controversies have become increasingly important as we seek to manage today's new and increasing demands on our limited supply.

I begin with an ultra-mini-review of water history in America. Until very recently, water has been plentiful in the middle and eastern regions of the country, and has been little regulated except for flood control, navigation and matters like well contamination. But in the West, which is generally thought of as land beyond the 100th meridian (i.e., west of Dallas), the country is mostly arid or semi-arid. There, water has been a subject of great legal and economic importance, and water law has developed very elaborately.

Because water was both scarce and essential, two basic ideas dominated thinking about it in the western states: First, it ought to be freely available to those who needed it, and thus not subject to the prospect of private monopolization; second, it should be used to promote public policies such as population growth and economic prosperity. Because of the first concern, it was never believed that market forces alone would suffice. In addition, it shortly became clear that private investment alone could not generate the extensive capital needed to build the water infrastructure. For that reason, government was from an early date a central player in the water economy.

From these beginnings—and in the setting of progressive era politics—came two remarkable ideas: (1) The legal precept that water belongs to the people of the state and that only use-rights could be obtained in water; and (2) that water law

must embrace a panoply of public-interest restrictions on those rights quite unlike those that apply to property generally.

WATER LAW IN CALIFORNIA AND THE WEST

California law is similar to that in other western states and I shall largely use it to illustrate the implementation of these principles. Article X, § 2, of the California Constitution says "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented…in the interest of the people and for the public welfare." That concept is spelled out in very first sections of our Water Code. § 100 provides that "the right to water or to the use or flow of water…shall be limited to such water as shall be reasonably required for the beneficial use to be served…" §102 provides that "All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."[1] §§ 104 and 105 set out the primacy of the State, providing that "the State shall determine what water…can be converted to public use or controlled for public protection"; and that the "protection of the public interest in the development of the water resources of the State is of vital concern to the people…and…the State shall determine in what way the water of the State…should be developed for the greatest public benefit." A more recent addition, in recognition of changing technologies and new demands, is codified as §101.5. It states that customary use shall not be solely determinative of reasonableness of the use, but as one factor to be weighed in determining reasonableness."

These powerful but very general provisions are accompanied by numerous specific code provisions and court decisions that give content to the concept of beneficial use as a public responsibility of rights-holders. Among those limits is the rule that water may only be used for a state-designated "beneficial" use;[2] that water cannot be held simply as an investment or for speculation, but must be utilized currently. Under the doctrine of forfeiture a water right is lost if it isn't used for a statutorily designated period of time,[3] Water cannot be wasted. For example, riparian irrigators can't demand continuation of natural flood flows to irrigate their land when users upstream seek to divert some of that water. Such

[1] The language derives from a statute of 1911, Stats. 1911, p. 821, and has been held not to apply to riparian rights acquired prior to that date. Tyndale Palmer v. Railroad Comm''n, 167 Cal. 163, 175 (1914).

[2] Water Code § 1240. A long-standing provision of the Code, §106 declares domestic use to be the highest use and "the next highest use is irrigation." There is no example of an existing non-irrigation use being displaced in favor of irrigation. The general understanding of this provision is that among competing uses for a permit for future use, assuming inadequate supply, irrigation would be preferred over other beneficial uses. However, I am not aware of such a preference being implemented in any reported case.

[3] Water Code §1241.

use is considered an unnecessarily extravagant irrigation technique, and thus wasteful.

Restrictions also apply to transfers under the no injury rule,[4] designed to protect other users (since water is a shared resource, and a given rivers flow will usually be used over and over before it reaches the sea). In general this means that one can only transfer the consumed portion of one's use, not what has flowed back into the river, such as agricultural runoff, or treated municipal wastewater, and has been used by downstream diverters. The no-injury rule also provides that transfers of use may "not unreasonably affect fish, wildlife, or other instream beneficial uses."[5] We also have area-of-origin laws, which protect source communities from the adverse impacts of inter-regional transfers.[6]

These are just a few examples of the numerous and distinctive laws in our water codes that vest in the public, rather than in a user/proprietor, the decision as to how it may employ its water rights. .

As contrasted with general property law, water law mandates not merely that a user refrain from injuring others, but that the user owes a positive duty to employ the resource prudently and in ways that benefit the public. These are real and consequential differences. A rich person can own half a dozen houses, and rarely or never occupy most of them. But no matter who you are, you can't deal that way with water. The distinctive message of the law is that water ultimately belongs to the community; and while individuals should of course benefit from it, it must always be used in ways that also benefit the community.

That precept also embraces recognition of changing public needs over time. The provision in the Water Code that customary use is not determinative of beneficiality or non-waste is an explicit recognition of changing standards, as was the repudiation of natural overflow irrigation.[7] There are many other notable instances. For example, recreation is today considered a beneficial use, and in various ways states now allow rights to instream flows to be acquired, whereas in previous times the only way to obtain a water right was physically to divert water out of the stream.[8] It was then thought wasteful to allow water simply to flow out to the sea. The same may be said of our area-of-origin laws, which for many years had never been invoked (that is no longer the case), but which our Court of

[4] Water Code §1725.
[5] Ibid.
[6] E.g., Water Code §§ 10505,10505.5, 11128, 11460, 12200-12205.
[7] Article X, sec. 2 of the California Constitution was inserted in 1928 specifically to overrule the decision in Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607 (1926), cert. denied 275 U.S. 486 (1927) that had allowed riparians to command the entire flow of the river for flood irrigation when the water was needed for development. .
[8] Sax, et al., Legal Control of Water Resources (4th ed. 2006), at 141. See Water Code §1707.

Appeals described as "reserv[ing] to the areas of origin an undefined preferential right to future water needs."[9]

Similarly, in a famous early Colorado case, the court held that leaving water instream to run down a waterfall as an aesthetic amenity was not a beneficial use, though it was economically valuable as the central feature of a popular resort. The explanation was that Colorado needed to husband its water for the kind of economic development the public wanted, such as mining, irrigated agriculture and municipal growth. Indeed, employing water to meet public goals was the justification for the western states' abolition of riparian rights in favor of prior appropriation which allowed a user to move water to where it was most needed, rather than limiting application to the riparian tract. The Colorado Court in a very early case rejected claims of riparian property rights in water by riparian tract land grantees, citing what it called the doctrine of "imperative necessity."[10]
.

THE CHANGING STATUS OF WATER

Notwithstanding these distinctive legal concepts, until quite recently water use-rights were treated much like ordinary property rights in the sense that the uses sought to be made were overwhelmingly conventional private or utility-type uses such as irrigation, industrial cooling, hydropower, and municipal supply. That is what users wanted water for, and that was what the public wanted as well. Thus, while some of the special rules that govern water use have been implemented—such as restrictions on wastefully extravagant use, forfeiture, and anti-speculation--the fuller potential implications of the status of water as public property were not until quite recently brought into question.

The reasons, in addition to those just stated, are two:

> First, scarcity was alleviated by the construction of huge publicly-subsidized reservoir and transmission projects that increased usable supply. As a result, the greatest fears of shortage and monopolization did not eventuate, and the perceived need for stringent public controls and reallocation, built into western constitutions and water codes, were not activated. Now, however, the public dam-building and supply subsidization era has largely ended.
>
> Second, adverse impacts on in-stream uses (in particular declining fish populations and greatly increased recreational demand) were not until recently a matter of significant public concern. Public enterprise also played a role here. The state fish hatchery was

[9] United States v. State Water Resources Control Bd., 182 Cal.App.3d 82, 139, 227 Cal.Rptr. 161,194 (1986).
[10] Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

> viewed as a technological substitute for instream habitat, and deferred concern about the loss of wild species, which contemporary environmental policies have brought to the fore.

As a result, the full potential of the law had not been put to the test. But the public claim on water is now very much in play as traditional users and uses confront the contemporary demand to protect and restore diminished in-stream resources. The significance and meaning of the public rights status of water right is—unfortunately--insufficiently understood.

It is best to begin by clarifying what public ownership of water does ***not*** mean. It does not mean that holders of state water-use rights have no legally protected property interests. As a practical matter, as between water users themselves, one has rights quite like those one has in other kinds of property. For example, a water rights holder is protected in its priorities against junior users, and is protected against trespass or unpermitted diversions by others, and so on. So it is a serious misstatement to assert, as is sometimes done, that there are no private property rights in water. Similarly, where government seeks water for a conventional use, to shift water from one group of private users to another, or for its own account as a user, needs to acquire the water, as would any private user. A classic example was the construction of Friant Dam, where the government cut off existing downstream irrigation users in order to capture the full flow of the river and divert the water to serve other off-stream irrigators.[11] The same is true if the government wants to displace some existing users in order to produce hydropower for its own account, as for use by a military facility.[12]. That said, it is a mistake to conclude that since a water use right granted by a state permit is proprietary in these important respects, it is therefore like any other private property right.

The important question is how to conceive of water rights where the state claims a need to return to public use water that has previously been permitted to private use and is being used pursuant to that permit.[13] What is the scope of the state's entitlement as against the holder of a permit or license? While, as I noted earlier, the statutory provision that "all water within the State is the property of the people…" has never been fully tested, the law powerfully supports the authority of the state to reclaim for the public domain use rights that it has previously granted.

---

[11] .E.g., Dugan v. Rank, 372 U.S. 609 (1963); U.S. v. Gerlach Livestock Co., 339 U.S. 725 (1950).

[12] International Paper Co. v. U.S., 282 U.S. 399 (1931).

[13] This distinction between rights as between private users, and rights as between a private user and the public, is well established. "Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all." United States v. Willow River Power Co., 324 U.S. 499, 510 (1945).

WATER CODE §§ 1392,1629

Without doubt, the most powerful, and least explicated, statutes authorizing the State to recall water for public use are the twin Water Code provisions §1392 and §1629.[14]

> Every permittee [or licensee], if he accepts a permit [or license], does so under the conditions precedent that no value whatsoever in excess of the actual amount paid to the State therefore shall at any time be assigned to or claimed for any permit [or license]…in respect to any valuation for purposes of sale to or purchase, whether through condemnation proceedings of otherwise, by the State…of the rights and property of any permittee [or licensee]…of any rights granted, issued or acquired under the provisions of [the law governing the appropriation of water].

This rather extraordinary provision has its own remarkable history. Dating back to the original water code of 1914 which first instituted a permit system for appropriations,[15] it was quite in tune with Progressive Era thinking of the time, when concern about monopolization of essential goods and services, and excessive charges by private utilities was at its greatest. The idea that water must remain "public" was central to the politics, and the experience, of economic overreaching of that era. In the course of time, private municipal water companies largely disappeared in favor of public entities, and water prices to agricultural users were self-controlled by statutorily authorized water districts, and later through generous federal subsidies. So the immediate economic fears that gave rise to those Water Code provisions never came to pass. And, as noted earlier, the potential perceived need for the public to take back water was avoided by increasing supplies via huge federal and state projects like Boulder Dam, the federal Central Valley Project and the State Water Project.

---

[14] Water Code §§1392,1629. The provisions are identical, except that the former deals with permits and the latter with licenses. Permits are usually issued prior to actual application of the water to beneficial use, and the use right only matures upon application, at which point the permit can be converted to a license. Water Code §1600 et seq.

[15] Notably, the provisions only apply to permits and licenses granted by the state subsequent to enactment of the Water Code. See case cited in note 1, *supra*.

In light of that history, not surprisingly §§ 1392 and 1629 remained on the books largely unremarked and unused. In 1970, a comprehensive and carefully researched review of California Water Law was issued by a Governor's Commission. Among its many recommendations, one—given only passing attention in the Report—was a suggestion to repeal §§ 1392 and 1629 on the ground that they could interfere with desired water marketing by limiting the ability of sellers to charge more than the fee they had paid to obtain their permit/license. The Report did not deal with a possible effort by the state to reclaim water for public use instream.

A bill incorporating many of the Commission's recommendations, and ultimately enacted, did include the repeal of those sections; but before enactment an amendment was offered deleting the repeal of those sections, and the bill passed with that amendment. So §§ 1392 and 1629 remained (and remain) on the books. No legislative history of that amendment has been found, and the assumption of those who recall the events is that there was a generalized concern about the possibility of undermining the fundamental principle that water was a public resource that ultimately belonged to the people of the State.

The only reported case on the laws involved a private company that sought to appropriate water and subsequently sell it for irrigation and municipal use. A claim that sale of water at a profit by a water company to an ultimate user was prohibited by §1392 was briefly rejected by the court on the narrow ground that the statute referred to a transaction involving sale of a permit, rather than of the water itself.[16] It did not deal with that part of the statute that limits what a permit or license holder may claim when water is taken back for public use by the state or other public entity by purchase or condemnation or otherwise. Application of the law to such a situation has not yet arisen in any reported case.
Strange as it may seem, in all the years §§ 1392 and 1629 have been on the books, the provisions also have given rise to almost no consideration in the literature.[17]

However, as we shall see presently, the essential idea embodied in 1392 and 1629, that the state is entitled freely to recover permitted rights for the general use and benefit of the public has been long recognized in California water law, giving content to the precept that water always remains the property of the public.

THE MONO LAKE CASE, THE FISH AND GAME CODE, AND THE PUBLIC TRUST

[16] Central Delta Water Agency et al. v. State Water Resources Control Bd. Et al., 124 Cal.App.4th 245, 274-75 (2004).
[17] Andrew Sawyer, Improving Efficiency Incrementally [etc.], 36 McGeorge L.Rev. 209,247 (2005); Brian E. Gray, The Property Right in Water, 9 Hastings W-N.W. J. Envt'l. L. & Policy 1, 15, n. 82 (2002).

The decision popularly known as the Mono Lake case[18] involved a decades-old water supply project in which Los Angeles had dammed and diverted water from several streams entering Mono Lake, lowering the lake level and impairing its usefulness as important habitat for nesting and migratory birds, including California Gulls, Eared Grebes, Northern Phalarope, and Wilson's Phalarope. The California Supreme Court held that the water rights Los Angeles held, though perfectly valid when acquired, were held subject to the public's rights in the waters as a public trust, and that, however longstanding, the public trust imposed a continuing obligation that could be invoked when and as required to protect the resources at stake. That principle had been established many years earlier in an offshore oil drilling case, where the California Supreme Court held that while the oil platform was not per se a violation of the public trust, if it could subsequently be shown to impair public rights in the waters, the oil drilling activity could at a later date be restricted as necessary to protect public use rights.[19]

The Mono Lake situation was not governed only by the common law public trust. Another long-standing pair of statutory provisions, which like Water Code §§ 1392 and 1629 had effectively been moribund during the developmental era I described earlier,[20] also applied to L.A.'s Mono Lake diversions, and were in fact implemented in the litigation there.[21]

These provisions are §§ 5937 and 5946 of the Fish & Game Code which provide that "[t]he owner of any dam shall allow sufficient water at all times…to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam."[22] Notably, that provision does not merely

---

[18] National Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983).

[19] Boone v. Kingsbury, 206 Cal. 148, 192-93 (1928). "The state may at any time remove [the] structures ..., even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce

[20] Notably, the Fish & Game Code provisions were invoked before the State Water Res. Control Bd (W.R.C.B.) when Friant Dam was authorized, in an effort to keep some water in the upper San Joaquin River, but were rejected on the ground that "[t]here certainly is nothing in federal law requiring a priority for fish life over irrigation, but quite the contrary," and it found that bypassing water to maintain a salmon fishery in the river "is not in the public interest." State.W.R.C.B. Decision D-953 (June 2, 1959), at 22,24. After nearly 20 years of litigation, the de-watered upper San Joaquin is being restored under a litigation settlement and federal San Joaquin River Restoration Settlement Act, Title X, Subtitle A, Omnibus Public Land Management Act of 2009.

[21] The law was finally applied to Los Angeles' Mono Lake tributary diversions in California Trout, Inc. v. Superior Court, 218 Cal.App.3d 187, 266 Cal.Rptr. 788 (1990). Los Angeles claimed that its rights vested prior to 1953, when the current version of the laws was enacted. Even if that were a defense, the court held that the critical date was when diversions actually began, in the 1970's. See also Brief of State of California, Amicus Curiae, Putah Creek Council v. Solana Irrig. Dist. , No. 3-CIVIL-CO-25527 (Cal.Ct.App., May 21, 1998). And a number of suits have been initiated pursuant to the Endangered Species Act to increase instream flows, perhaps most notably the NRDC's long,, and finally successful, effort to get water flowing again past Friant Dam and into the upper San Joaquin River. NRDC v. Rodgers, 381 F,Supp.2d 1212 (E.D. CA 2005).

[22] That provision was enacted in 1957, but derived from a 1933 provision, Stats. 1933, c. 73, p. 443, §525).

reaffirm the by-pass requirements that were incorporated in dam permits, but states a continuing obligation to protect fish in the river, essentially importing the State's right to reclaim water (that it has always owned) when it is necessary to protect an instream public value. Likely for the reasons stated earlieer, it was treated as a dead letter during the era of full-throated development of diversionary uses of water,[23] though some bypass flow requirements were routinely inserted into dam permits. The Fish & Game Code provisions are now regularly employed in California water law.

NOT AS STRANGE AS IT MAY SEEM: THE PRECEDENT OF UNITED STATES v. FULLER .

It no doubt seems odd that something which has functioned for a long time as a conventional property right, which has evidenced the usual indicia of ordinary property, and been valued in the market as such, can subsequently lose its proprietary status as against the public. It is indeed unusual,, but by no means is it unprecedented.

That very circumstance was central to a 1973 case in the U.S. Supreme Court, United States v. Fuller.[24] The Court's opinion was written by former Chief Justice Rehnquist (a staunch defender of private property rights). In that case a rancher held a federal grazing permit for use on land adjacent to his own. Such permits are regularly renewed and very rarely revoked. In practice they have considerable economic value and function like ordinary private property. For example, they serve as collateral for loans and in the event of sale their value is capitalized in the price of the private land to which they are adjacent. However, the law governing such permits, the Taylor Grazing Act, expressly states that "issuance of a permit…shall not create any right, title, interest, or estate in or to the lands" for which the permit is issued.[25] When the United States condemned the rancher's own land for a federal project, he claimed that the compensation due should include its pre-condemnation market value, which reflected the value of his grazing permit.

Justice Rehnquist's opinion held that since there was no property in the grazing permit under the law, the landowner was not entitled to be compensated for the value it added to the condemned tract. [26] The question, he noted, was not

---

[23] See text at p. 4**, *supra*.
[24] 409 U.S. 488 (1973).
[25] 43 U.S.C.A. §315b. The non-property status of grazing permits was re-affirmed in FLPMA in 1976, 43 U.S.C. § 1752(h). Following a case in which the United States exercised its servitude, denying compensation, but then sold the land to the State at a price below the option it had to purchase it, Congress called for payment when the servitude is exercised. See Rivers and Harbors Act of 1970, §111, 33 U.S.C. § 595a, effectively overruling United States v. Rands, 389 U.S. 121 (1967).
[26] The Court split 5-4. Justice Powell's dissent was joined by Justices Douglas, Brennan and Marshall.

whether in practice the permit functioned, and was treated, as ordinary private property, which it plainly was, but what the governing law provided. In support of the decision, Rehnquist cited a long line of cases in which the Court had held that when private land adjacent to a navigable river is condemned, the owner is not entitled to recover for any market value the land had because of its adjacency to the water (commonly its hydropower potential), because any private rights in the water, however valuable as against others, were subject to the federal navigation servitude, effectively the public's ownership interest in the water. Like the situation in Fuller, and like the case of water rights users in California, the navigation servitude was infrequently exercised, and so the market did not discount their value in recognition of that possibility. As Justice Jackson famously noted, navigation servitude decisions are simply modern applications of the time-honored precept "that the running water in a great navigable stream is capable of private ownership is "inconceivable."[27] In the arid West, that principle applies not just to navigable streams, but to "all water within the state."[28]

-end-

9/25/2011 9:50 AM
Waterpaper.s23

[27] United States v. Willow River Power Co., 324 U.S. 499, 508 (1945), quoting United States v. Chandler-Dunbar Co., 229 U.S. 53,,69 (1913).
[28] Cal. Water Code §102.